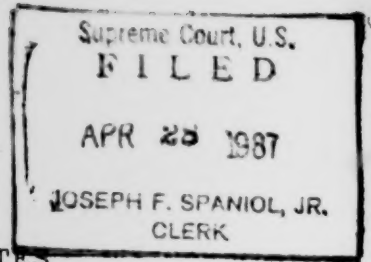


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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

BRADLEY W. BEHRMAN,

Petitioner,

v.

VERONICA L. BEHRMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

BRADLEY W. BEHRMAN

(pro se)

18275 Jamestown Circle

Northville, MI 48167

(313) 349-3675



QUESTIONS PRESENTED

1. Whether a defendant in a no-fault divorce case which was settled without a trial is entitled to a hearing before being ordered to pay a portion of plaintiff's counsel fees.

2. Whether a probate judge is required to explain the monetary basis of his award of counsel fees so as to make meaningful review possible.

PARTIES BELOW

The parties below were Bradley W. Behrman and Veronica L. Behrman.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

No. 87-

BRADLEY W. BEHRMAN,
Petitioner,
v.
VERONICA L. BEHRMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

OPINIONS BELOW

The opinion of the Commonwealth of
Massachusetts Appeals Court's affirmation
of the Probate Court's order (App. A, pp.
A-1 - A-4, *infra*) is not reported, though
Summary Disposition is noted at 23 Mass.
App. Ct. 1104 (1986). The opinion of the
Probate Court (App. ^D~~A~~, pp. A-7 - A-10, *infra*)
is not reported.

JURISDICTION

The judgment of the appeals court was entered on November 28, 1986, and a timely petition for rehearing was denied on January 7, 1987 (App ^B X, p. A-5, infra). The Supreme Judicial Court for the Commonwealth of Massachusetts denied the Application for Further Review on January 28, 1987 (App. S, p. A-6, infra). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the U.S. Constitution, which includes the clause: "nor shall any State deprive any person of life, liberty, or property without due process of law;" USCS Constitution, Amendment 14.

STATEMENT

1. Background

Mrs. Behrman, the plaintiff in a no-

fault divorce action, was granted a judgment of Divorce Nisi on October 3, 1985 (App. ~~X~~^E, pp. A-9 -A-10, *infra*). Included in that judgment was an order that Mr. Behrman, the defendant-petitioner, pay a portion of the plaintiff's counsel fees as provided under Massachusetts G.L. c. 208, §38, which states that "in any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated.

No trial was ever held, as the parties had reached agreements concerning all issues except responsibility for counsel fees. The counsel fees for both parties were substantial due to the occurrence of a large number of pretrial pleadings resulting from:

1. the inability of the parties to reach agreements concerning physical

and legal custody of the parties' child, visitation, and division of property;

2. postponement by the court of the scheduled trial date until over two years had passed from the plaintiff's initial motion for divorce;
- and 3. changing circumstances over the period preceding the rescheduled trial date.

The pretrial pleadings consisted of hurried, informal hearings held before several different judges without the recording of any transcripts.

On August 15, 1985, after all other issues had been settled, plaintiff filed a motion for counsel fees accompanied by a memorandum in support of costs. On September 4, 1985, defendant responded with a motion of defendant for counsel fees accompanied by a memorandum in opposition to

plaintiff's motion and in support of his motion.

2. Probate Court Order

On October 3, 1985, without any hearing, the probate court issued the order that the defendant pay a portion of the plaintiff's counsel fees, citing defendant's "numerous, duplicative and non-meritorious pleadings" (App. ^DX, pp. A-7 - A-8, *infra*). The defendant at no time had an opportunity to introduce evidence refuting this judgment. Furthermore, the basis of the figure selected by the court to be paid by the defendant was not explained.

3. Appeals in State Courts

Defendant, acting as his own attorney, filed a timely appeal to the Commonwealth of Massachusetts Appeals Court contending that the Probate Court Order lacked merit and violated accepted court principles.

The defendant's brief included contentions that he was not permitted to present oral testimony or to cross-examine the plaintiff. It also contended that "court did not and cannot relate" the figure ordered to be paid by the defendant to the actual costs associated with the pleadings cited in the order. On November 28, 1986, the Appeals Court issued a summary disposition under Rule 1:28 of the Massachusetts Appeals Court Rules affirming the order and denying the opportunity for oral argument (App. A, pp. A-1 - A-4, *infra*). The ruling further cited several cases concerned with the issue of whether an attorney is entitled to collect fees he earned instead of the pertinent issue of by whom he should be paid. It further stated that "in such cases as this the judge is not required to hold an evidentiary hearing," and cited a reference to a case (Robbins v. Robbins, 476 NE 2d,

230 (1985)) which referenced a second case (Ross v. Ross, 430 NE 2d 815 (1982)) wherein a hearing was not deemed necessary because, in that case, a trial and masters report concerning counsel fees were already on the record.

On December 7, 1986, defendant filed a timely Petition for Rehearing citing the apparent misunderstanding by the Appeals Court of the issues in the case, citing the lack of opportunities for presentation of evidence, and raising the contention that defendants in Massachusetts no-fault divorce cases who agree to settle the custody, visitation and property issues of their cases without trials are apparently subject "to the liability of a punitive assessment of attorney fees based on a judgment inherently made without affording the protections of due process of law." This petition was denied by the Appeals Court on January 7, 1987 (App. ^B~~A~~, p. A-5).

Defendant filed a timely Application for Leave to Obtain Further Appellant Review to the Commonwealth of Massachusetts Supreme Judicial Court which included further contentions that his right to due process under both the Massachusetts Constitution and the 14th Amendment to the U.S. Constitution had been violated by the order to deprive him of property without a hearing to permit him the opportunity to present evidence, cross-examine witnesses, and generate a factual record. This Application for Further Review was denied by the Supreme Judicial Court on January 28, 1987 (App. ^CA, p. A-6, *infra*).

REASONS FOR GRANTING THE WRIT

In this case, a state court of last resort has denied petitioner's Application to Review an important question on which the state courts have ruled in conflict

with previous federal and state court rulings: the right of a defendant to a fair hearing before being deprived of property.

The court has previously stated in Fuentes v. Shevin, 92 S. Ct. 1983(1972) that "the rather ordinary costs in time, effort and expense resulting from hearing held prior to deprivation of property interest cannot outweigh the constitutional right to a hearing." A "fair hearing" has been commonly cited in court decisions as a requirement for "due process"; People v. Coates, 59 NW 2d 83 (1953); Lane v. Warden, Md. Penitentiary, 320 F. 2d 179 (1963); People v. Weaver, 412 NE 2d 1353 (1980).

The court in Brown v. Brown, 422 P.2d 634 (1967) stated: "Black's Law Dictionary, (3d ed.) defines a 'hearing' as 'technically the trial of the case, including the introduction of evidence, the argument of the solicitors, and the decree of the chancel-

lor.' 'The word contemplates not only the privilege to be present when the matter is being considered but the right to present one's contention and to support the same by proof and argument.'" The Fifth Edition of Black's Law Dictionary (p. 537) defines the term "fair hearing" as "one in which authority is fairly exercised; that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the right to present evidence, to cross-examine, and to have findings supported by evidence." This definition is supported by several rulings cited in Jeffries v. Olesen, 121 F. Supp. 463.

Due process, guaranteed by the Fourteenth Amendment of the U.S. Constitution, guarantees the rights essential to a fair hearing and requires that there be an opportunity to present every available de-

fense; Lindsey v. Normet, 405 US 56 (1972). Yet the Massachusetts courts permit a judge to deprive a defendant of property by making judgments which defendant has never had an opportunity to refute. The only opportunity given for the presentation of evidence in the case at hand after plaintiff's motion for counsel fees was filed was the opportunity for each party to file a memorandum; these memoranda did not focus on the specific pleadings cited by the judge in his order, which could not have been anticipated as the key issues affecting his ruling. The only other testimony presented during the duration of the case was testimony presented during pretrial motions by both parties; this testimony, portions of which were presented before several different judges over a two-year time period, covered a wide range of subjects, was unsworn, unrecorded by transcript, and incom-

plete due to courtroom time constraints.

Due process also requires that a hearing, to be meaningful, offers reasonable opportunity to correct error; Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (1970). No such opportunity existed here where no record of a fair hearing exists.

There is clearly a need for the Supreme Court to clarify whether a fair hearing is required before a probate court judge can require a party to pay his adversary's counsel fees in divorce cases which are settled without trial. In view of the growing number of no-fault divorces, resolution of this question will help prevent future abuse of judicial discretion and prevent much needless future litigation.

A second issue in this case also merits consideration for the granting of a writ of certiorari on the grounds that a state court of last resort has decided the fol-

lowing federal question in a way in conflict with a federal court of appeals: the right of a defendant to an explanation by the "trial judge" of considerations used to determine the amount of property he is to be deprived of.

This issue has previously been decided in Lee v. Lee, 537 F. 2d 762(1976), which concluded clearly that trial judge must explain considerations that enter into his decisions regarding attorney's fees in order to provide basis for appellate review and, in a case where only explanation offered by court was that 50 hours appeared "more reasonable" than the 77 hours claimed by counsel in its affidavit, counsel fee provision of judgment of divorce would be vacated and cause remanded.

Probate Court orders to pay the counsel fees of an adversary which do not explain the basis of the amount awarded as it re-

lates to the underlying judgment provide no basis for appellate review, and a ruling on this issue in the case at hand would help prevent future abuse of judicial discretion.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

BRADLEY W. BEHRMAN

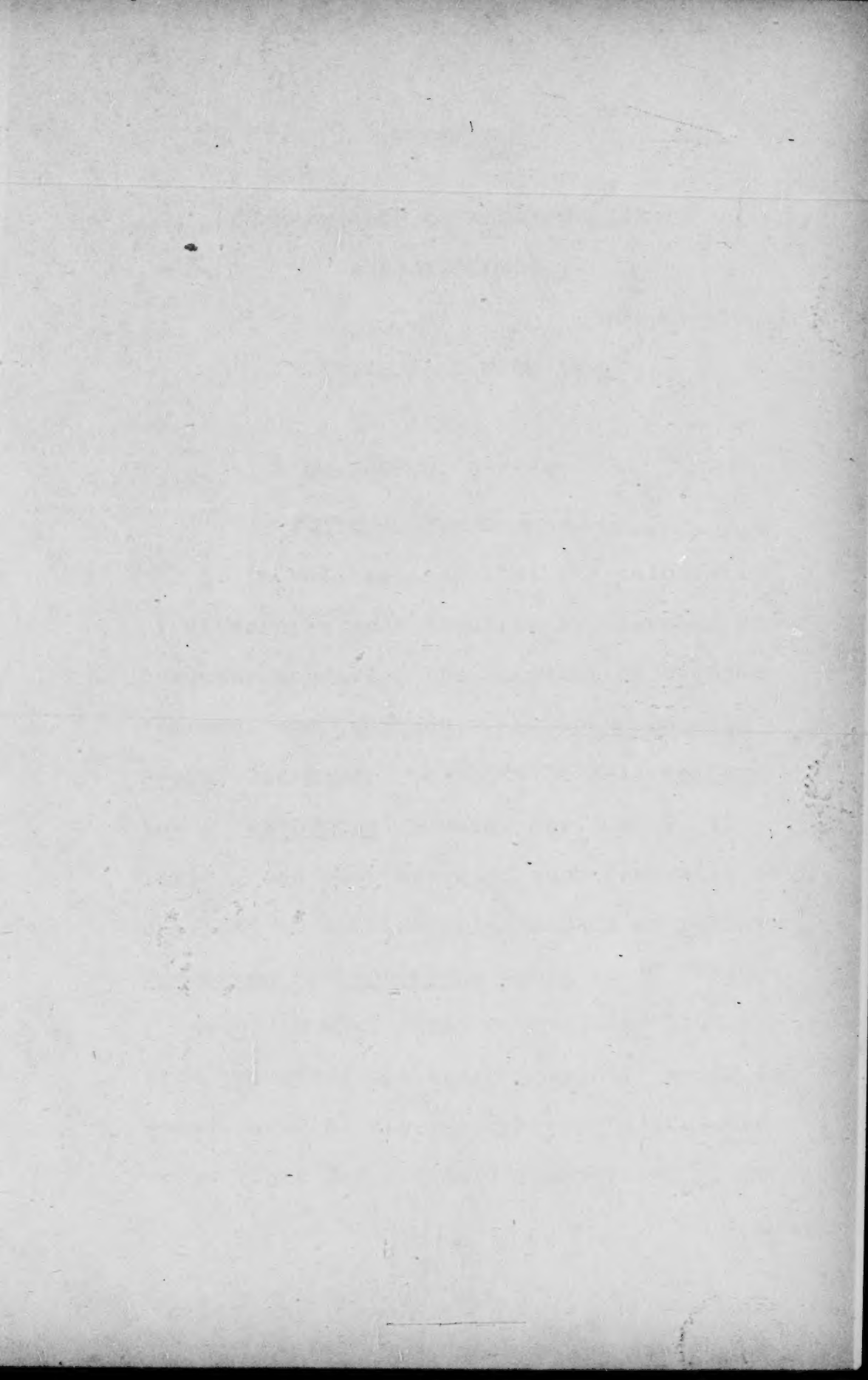
(pro se)

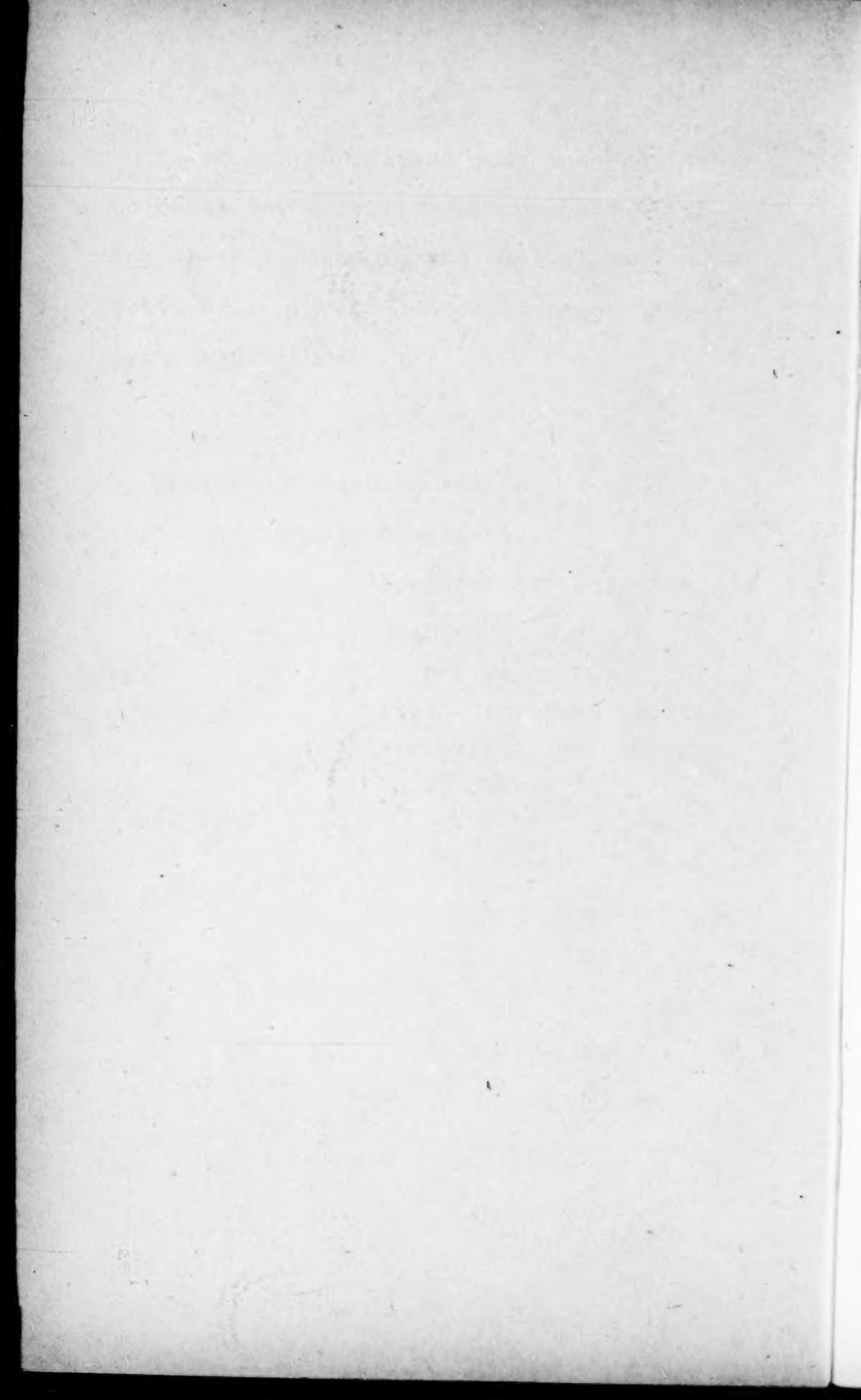
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April 1987





APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 86-550

VERONICA L. BEHRMAN

VS.

BRADLEY W. BEHRMAN.

MEMORANDUM AND ORDER

It is well settled that the calculation of attorney's fees requires an exercise of judgment involving the application of many factors, see Cummings v. National Shawmut Bank, 284 Mass. 563, 569 (1933); Pemberton v. Pemberton, 9 Mass. App. Ct. 9, 17 (1980), and that award of such fees will be entitled to considerable respect on review. Pemberton v. Pemberton, supra at 17. Kane v. Kane, 13 Mass. App. Ct. 557, 560 (1982). "The amount of the award generally rests in sound judicial discretion, may be presumed to be right and ordinarily ought not to be

disturbed." Meghreblian v. Meghreblian, 13 Mass. App. Ct. 1021, 1023-1024 (1982).

In the instant matter, the same judge who heard the parties' divorce action also heard many of the husband's earlier motions (a significant number of which were characterized by the court as being "duplicative and non-meritorious").^{1/} The judge was able to observe firsthand the skill and performance of counsel and the results achieved by them, see Edinburg v. Edinburg, 22 Mass. App. Ct. 192, 198 (1986); Robbins v. Robbins, 22 Mass. App. Ct. 982, 983 (1986), and also had before him the detailed time records of the wife's counsel. See Edinburg v. Edinburg, supra at 198 n.17. Moreover, the court had knowledge of the parties' financial positions and stated

^{1/}We do not have before us the transcripts of the hearings on those motions. However, the husband himself admits in his brief that certain motions filed by him "would probably not have been filed had the courtroom appearance not been necessitated by the priority motion."

that the award could be paid by the husband from his share of the net proceeds arising from the sale of the former marital residence. See Kane v. Kane, 13 Mass. App. Ct. at 561; Davidson v. Davidson, 19 Mass. App. Ct. 364, 378 (1985); Robbins v. Robbins, 22 Mass. App. Ct. at 983.

In the circumstances here present, we are satisfied that the order, incorporated in the judgment nisi, requiring the husband to pay \$1425 to the wife's attorney ^{2/}✓ was reasonable and that the judge "dwelt on the relevant considerations" Robbins v. Robbins, 19 Mass. App. Ct. 538, 543 (1985). We note also that in such cases as this the judge is not required to hold an evidentiary hearing. See Edinburg v. Edinburg, 22 Mass. App. Ct. at 198; Robbins v. Robbins, 19 Mass. App. Ct. at 543 n.10.

^{2/}✓ The counsel fee award constitutes only fifteen percent of the wife's total counsel fees.

The wife is to have double costs on this appeal and reasonable attorney fees for the appeal, in an amount to be determined by the Probate Court.

Therefore, upon consideration of the appendices and briefs it is ordered, under the provisions of Rule 1:28 of this court, that the following entry be made on the docket of the Probate court in the above matter:

Judgment affirmed.

By the Court

(Perretta, Cutter &
Smith, JJ.),

/s/ Nancy Foley
Clerk

Entered: November 28, 1986

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 86-550

VERONICA L. BEHRMAN

vs.

BRADLEY W. BEHRMAN.

ORDER

The petition for rehearing filed by the appellant having been considered it is ordered that the said petition be, and the same hereby is, denied.

By the Court (Perretta,
Cutter & Smith, JJ.),

/s/ Grubert Quigly
Assistant Clerk

Entered: January 7, 1987.

APPENDIX C

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

OFFICE OF THE CLERK, 1412 COURT HOUSE,

BOSTON 02108, (617) 725-8055

No. FAR-4126

JAN 28, 1987

VERONICA L. BEHRMAN

VS.

BRADLEY W. BEHRMAN

MOTION to File Reduced Number of Copies-
of Application. ALLOWED

In the Application for Further Review an
Order has been entered that the Appli-
cation is DENIED

Jean M. Kennett, Clerk

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK Division Docket No. 83M0755-D1

ORDER (Motion for Counsel Fees)

Veronica L. Behrman, Plaintiff

v.

Bradley W. Behrman, Defendant

This action came on for (trial)(Hearing)
before the Court, KOPELMAN, Justice pre-
siding, ~~and the issues having been duly~~
~~tried)(heard) and findings having been~~
~~duly rendered.~~

It is Ordered and ~~Adjudged~~: that the hus-
band shall pay forthwith towards the wife's
counsel fees, directly to her attorney,
Paul D. Maggioni, the sum of \$1,425 pursu-
ant to the provisions of G.L. c. 208, §38.
These fees are awarded primarily, but not

exclusively, on account of the husband's numerous, duplicative and non-meritorious pleadings which include, inter alia; motions to reduce temporary support, terminate child support, provide him with alimony, have the minor child removed from her current school and to continue the trial date.

Said counsel fees in the amount of \$1,425 may be paid out of the husband's share of the net proceeds arising out of the sale of the former marital residence.

October 3, 1985

Date

/s/ Daniel H. Kopelman

Justice of the Probate
and Family Court

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

Norfolk Division PROBATE AND FAMILY COURT

Veronica Behrman Plaintiff— No. 83M0755-D1
of Narragansett in the State of Rhode Island

v. Judgment of Divorce Nisi

Bradley W. Behrman Defendant
of Plainville in the County of Norfolk

All persons interested having been notified in accordance with law and after hearing it is adjudged nisi that a divorce from the bond of matrimony be granted the said plaintiff for the cause of an irretrievable breakdown of the marriage under G.L. c. 208, §;-B; the Court finds that there has existed from the period following the filing of the complaint and up to the date of the hearing, a continuing irretrievable breakdown of the marriage, as provided by Chapter 208 ss 1-2 and that upon and after the expiration of

ninety days from the entry of this judgment it shall become and be absolute unless, upon the application of any person within such period, the Court shall otherwise order, and it is further ordered that the Agreements dated August 12, 1985 and August 14, 1985 are incorporated and made a part of this judgment, are merged herein and are deemed to have no independent legal significance.

It is further ordered that the husband shall forthwith pay towards the wife's counsel fees, directly to her attorney, Paul D. Maggioni, the sum of \$1,425 pursuant to the provisions of G.L. c. 208, § 38. Said counsel fees in the amount of \$1,425 may be paid out of the husband's share of the net proceeds arising out of the sale of the former marital residence.

All until the further order of the Court.

October 3, 1985 /s/ Daniel H. Kopelman

Date

Justice of the Probate and
Family Court

